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NO. 84-769

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALBERT JOHN FERN, JR. AND
ROBERT LEWIS STIRM, PETITIONERS

v.

JOAN TURMAN, JOHN O. MARSH,
SECRETARY OF THE ARMY, LORETTA F. ADAMS
AND VERN ORR, SECRETARY OF THE AIR FORCE

BRIEF OF LORETTA F. ADAMS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether or not the decision of the United States Supreme Court in McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 invalidates the 1974 Amended Interlocutory Decree awarding Loretta F. Adams a portion of Robert Lewis Stirm's military retirement pay as community property.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-769

Respondent Loretta F. Adams respectfully prays that the Petition for a Writ of Certiorari of Petitioner Robert Lewis Stirm to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 10, 1984, affirming an order of the district court dismissing a complaint brought by petitioner Stirm against Loretta F. Adams, his former spouse, and the Secretary of the Air Force, be denied.

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I.

STATEMENT OF FACTS

Petitioner Robert Lewis Stirm, (hereinafter called "Stirm"), entered the United States Air Force on September 18, 1953, and retired as Colonel on June 1, 1977. On February 6, 1955, while he was on active duty, Stirm married Respondent Loretta F. Stirm, (now since her remarriage known as Loretta F. Adams and hereinafter called "Adams"). After 18 years of marriage, Adams filed a petition for dissolution of marriage in the San Mateo County Superior Court. On July 22, 1974, an Amended Interlocutory Judgment was filed and on August 14, 1974, a Final Judgment of Dissolution was entered; neither judgment was appealed and both judgments therefore became final.

In dividing the community property between the parties, the Amended Interlocutory Judgment distributed 42.6899% of Stirm's retirement pay to Adams (accrued

as of September 17, 1973) and 42.6899% of Stirm's retirement pay to Stirm, in accordance with community property laws in effect at that time.

In June of 1981 your this Honorable Court ruled that federal law preempted state law, and prohibited division of a spouses's military retirement benefits upon dissolution of marriage (McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589). After that decision, Stirm ceased making payments as required by the Amended Interlocutory Decree of 1974.

On February 1, 1982, Adams moved the state court for an order to compel compliance with the 1974 decree. Stirm filed a petition to remove the state action to the U.S. District Court and also filed a declaratory relief action in U.S. District Court seeking a determination that the 1974 state judgment was void under the McCarty decision.

On September 3, 1982, the U.S. District

Court for the Northern District of California entered its order dismissing the declaratory relief action in that court and remanding the action back to the state court for failure to state a federal claim, other than as a defense to a claim based entirely on state law. Stirm appealed.

While the appeal was pending, Congress enacted (effective February 1, 1983) the Uniformed Services Former Spouses Protection Act, title 10 of the United States Code, Section 1408 (hereinafter called USFSPA) permitting state courts to treat retired pay as either personal or community property in accordance with state law (10 U.S.C. Section 1408(c)(i). As indicated by the opinion filed by the Ninth Circuit Court of Appeals (B-1 through B-12 of the Appendix to the petition for writ of certiorari), the judgment dismissing the complaint filed by Stirm was affirmed.

In the meantime Adams filed a new motion to compel compliance with the 1974

state judgment in the state court and on May 13, 1983, obtained an order compelling compliance with the 1974 state judgment with reference to payment by Stirm of a portion of his military retirement pay to Adams as therein provided.

As indicated previously the sole issue presented by the petition for writ of certiorari insofar as Stirm and Adams are involved is whether or not your decision in McCarty v. McCarty, supra, invalidates the 1974 Amended Interlocutory Decree awarding Adams a portion of Stirm's military retirement pay as community property. It is submitted for the reasons hereinafter indicated that McCarty does not and that the USFSPA overrules any such conclusion to the contrary.

II.

ARGUMENT

A . McCARTY DECISION NOT RETROACTIVE.

Federal Department Store, Inc. v. Moite (1981) 452 U.S. 394, 101 S.Ct. 2424, 69

L.Ed.2d 103, specifically held that a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action, and that the res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or may have rested on a legal principle subsequently overruled in another case.

As noted in Armstrong v. Armstrong (1983) 696 F.2d 1237 at 1238:

> "...the argument that McCarty rendered contrary state court judgments void for lack of subject matter jurisdiction was foreclosed when the United States Supreme Court dismissed the appeal of In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981) for want of a substantial federal question."

Accordingly, Adams believes that this Court would not apply its decision in McCarty retroactively to the 1974 state court judgment involved in the dispute between Stirm and Adams where, as here, the judgment has become final.

The latest California state court decision of record concluding that the McCarty decision does not permit collateral attack on state court judgments which became final before the effective date of that decision is In Re Marriage of Thomas (1984) 156 C.A.3d 631, 203 Cal.Rptr. 58.

B. USFSPA OVERRULES McCARTY.

On September 8, 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act, effective February 1, 1983, permitting state courts to treat retired pay as either personal or community property in accordance with state law (10 U.S.C. 1408(c)(i). It is clear that Congress has now provided power to each state through USFSPA to deal with military pensions in the manner in which it had previously treated them, or chooses to treat them in the future, at least in the view of the California courts (See In Re Marriage of Sarles (1983) 143 C.A.3d 24, 191 Cal.Rptr. 514).

Thus it seems clear that even if McCarty were applicable to the 1974 state judgment in this case, the USFSPA has removed any doubt with respect to the enforcement thereof.

As this court said in McCarty (at 453 U.S. 235-236, 101 S.Ct. 2743):

> "...Congress may well decide, as it has in the Civil Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone."

III.

CONCLUSION

In view of the fact that McCarty appears to be inapplicable to the 1974 state court judgment involved, and in view of the fact that in any event Congress has legislatively determined that state law is to be applicable, the petition for writ of certiorari sought by Stirm should be denied.

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Dated: December 15, 1984.

Respectfully submitted,

WILSON, MORTON, ASSAF &
McELLIGOTT

By _____
ROBERT K. BOOTH, JR.
Attorneys for Respondent
Loretta F. Adams

CERTIFICATE OF SERVICE

I, DIANE ARCEO, certify as follows: I am a citizen of the United States and a resident of the County of San Mateo, California; that I am over the age of eighteen (18) years and not a party to the within entitled action; that my business address is 630 North San Mateo Drive, San Mateo, California; that on January 2, 1985, I served the within BRIEF OF LORETTA F. ADAMS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the attorneys in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office box at San Mateo, California, addressed as follows:

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I, DIANE ARCEO, certify and declare under penalty of perjury that the foregoing is true and correct. Executed on January 2, 1985, at San Mateo, California.

Diane Arceo
DIANE ARCEO